

# Plant Variety Rights Amendment Bill

Government Bill

## Explanatory note

### General policy statement

The purposes of this Bill are to—

- increase the incentives for New Zealand plant breeders to develop new varieties and for foreign plant breeders to allow their new varieties to be released in New Zealand;
- implement the recommendations of the Royal Commission on Genetic Modification relating to “essentially derived varieties”;
- provide measures that go some way towards addressing concerns regarding the granting of plant variety rights over indigenous varieties.

### Clause by clause analysis

*Clause 1* gives the Bill its title.

*Clause 2* relates to the commencement of the Bill.

The main changes proposed by the Bill are as follows:

- currently the owner of a variety is defined as a person who bred or discovered a variety. The Bill clarifies that there must be a degree of human input into the development of a variety. Mere discovery by itself is insufficient to justify a claim to ownership of a new variety;
- currently the Commissioner, when approving a denomination proposed for a new variety, is not required to take account of whether the denomination may be offensive to a significant section of the community, including Māori. In future, this will have to be taken into account;

- under the current arrangements, a grant gives its owner the exclusive right to sell and produce for sale the reproductive material of a protected variety and, if the protected variety falls into specified categories, the exclusive right to propagate that material for commercial production of fruits, flowers, and other products. Under the new arrangements, a grantee will have more extensive rights to prevent other people from exploiting the protected variety without the grantee's authority. The extra rights include the right to prevent other people from producing or reproducing, conditioning for propagation, selling or marketing, or importing or exporting the reproductive material of a protected variety. They also include the right to prevent other people stocking that material for any of those purposes and authorising other people to do any of those things:
- currently, the principal Act prevents the importation of the produce of a protected variety from countries in which it is not possible to obtain the equivalent of a grant under the principal Act. This Bill gives broader rights in respect of any unauthorised use of harvested material if the grantee has not had a reasonable opportunity to exercise his or her rights in relation to the reproductive material from which that material was harvested:
- the principal Act does not currently provide any protection for a grantee in respect of varieties that are predominantly derived from a protected variety (the **initial variety**) although distinct from it. This Bill introduces the concept of essentially derived varieties (**EDVs**) and proposes that a grantee has the same rights in relation to an EDV as in relation to the initial variety. In practice this will mean that although it will be possible for another person to get a grant in an EDV, the person will need permission from the person who holds the grant in the initial variety in order to be able to exploit the EDV:
- the proposal in this Bill to expand the rights of grantees potentially impacts on the ability for farmers to save seed from crops for replanting. This Bill proposes an exception to allow this practice to continue.

## Part 1

### Amendments to principal Act

*Clause 3* amends section 2 of the Plant Variety Rights Act 1987 (“the principal Act”) (which relates to interpretation) by—

- inserting a definition of breed and amending the definition of owner. These changes make it clear that there must be a degree of human input into the development of a variety. Mere discovery by itself is insufficient to justify a claim to ownership of a new variety:
- inserting a definition of essential characteristics for the purpose of the definition of essentially derived variety, and a new definition of essentially derived variety for the purposes of *new section 17B* (see *clause 6*) and related clauses:
- substituting a new definition of variety in order to modernise this definition and align it with the definition of essentially derived variety inserted by this clause.

*Clause 4* inserts *new subsection (3A)* into section 10 of the principal Act. *New section 10(3A)* provides that the Commissioner of Plant Variety Rights (the **Commissioner**) must not approve a proposed denomination for a variety if the Commissioner considers its use or approval would be likely to offend a significant section of the community, including Māori.

*Clause 5* amends section 11 of the principal Act by omitting references to the word “discovered” for consistency with the new definition of breed and the amended definition of owner (see *clause 3*).

*Clause 6* repeals section 17 of the principal Act and inserts *new sections 17 to 17E*. *New sections 17 to 17C* significantly expand the rights of grantees set out in the existing section 17 as follows:

- the existing section 17 provides only for the exclusive right to sell and produce for sale the reproductive material of a protected variety and, in relation to specified varieties, the exclusive right to propagate for commercial production of fruits, flowers, and other products:
- in contrast, *new sections 17(1) and 17(2)* set out an expanded group of rights in relation to the reproductive material of a protected variety, including the right to prevent other people, without the grantee’s authorisation, from producing or reproducing, conditioning for propagation, offering for sale, selling or marketing, or importing or exporting the reproductive material of a protected variety. These sections also provides

for the right to prevent other people from stocking that material for any of these purposes without the grantee's authorisation and authorising other people to do any of these things:

- *new section 17(3)* carries over the effect of the existing section 17(7):
- *new section 17A* extends the effect of *new section 17(1)* to include material harvested from the unauthorised use of reproductive material of a protected variety, or products made from that material, if the grantee has not had a reasonable opportunity to exercise his or her rights relating to the reproductive material (for example, because the reproductive material was used to produce harvested material in a country in which it is not possible to obtain the equivalent of a grant under the principal Act):
- *new section 17B* relates to a grantee's rights in relation to an essentially derived variety (for which there is a new definition inserted by *clause 3*). The effect of this amendment is that a grantee has the same rights in relation to an essentially derived variety as in relation to the protected variety itself. Broadly speaking, a variety is essentially derived from another variety if it is predominantly derived from the other variety and has the same essential characteristics resulting from that variety's genotype. This new right applies only in respect of protected varieties if the grant was applied for and made after the commencement of this Bill. Although it will be possible for a person other than the grantee to get a grant of rights in respect of the essentially derived variety, that person will need the first grantee's permission to exploit the essentially derived variety:
- *new sections 17C to 17E* carry over the effect of other parts of the existing section 17.

*Clause 7* substitutes *new sections 18 to 18B* for the existing section 18. These new sections provide for exceptions to the grantee's rights that are provided for in *new sections 17 to 17D*. The current exceptions are contained in existing section 18. The new exceptions are as follows:

- *new section 18* provides that a grantee's rights are not infringed if a person uses a protected variety or an essentially derived variety for non-commercial purposes or uses reproductive or harvested material of a protected variety or an essentially derived variety for human consumption or other

non-reproductive purposes. These provisions are similar to existing section 18(a) and (c) of the principal Act:

- *new section 18A* provides that a grantee's rights are not infringed by acts done for the purpose of breeding a new variety or acts done to exploit that newly bred variety if those acts do not require the repeated use of the protected variety. Despite this exception, the right to exploit a newly bred essentially derived variety is restricted by the grantee's rights in the essentially derived variety. These provisions are similar to existing section 18(b) of the principal Act, but relate to the expanded set of rights provided to the grantee by this Bill:
- *new section 18B* provides for a new exception in the case of farm-saved seed, as outlined immediately below.

The exception in the case of farm-saved seed is provided for in *new section 18B*, but is qualified by *new section 38(na)* as inserted by *clause 10*. The features of this new exception are—

- *new section 17(1)* provides that a grantee has exclusive rights in relation to the conditioning or reproduction of the reproductive material of a protected variety. It follows that the practice of saving and planting seed from farming crops of protected varieties would, were it not for the exception in *new section 18B*, constitute a breach of the grantee's rights:
- *new section 18B* provides for an exception to allow the use of reproductive material from farm crops, and therefore the saving and planting of seed from crops, unless the protected variety is an excluded variety under *new section 38(na)*:
- *new section 38(na)*, as inserted by *clause 10*, provides that a variety may be declared to be an excluded variety. The effect of this is that the farm-saved seed exception does not apply.

*Clause 8* makes consequential amendments to section 20 of the principal Act to take into account the repeal of section 17 and the substitution of new provisions.

*Clause 9* amends section 23 of the principal Act to clarify that there is an appeal right in relation to the refusal by the Commission to refuse a proposed denomination.

*Clause 10* provides that regulations may be made declaring a variety an excluded variety in relation to the farm-saved seed exception (see *new section 18B*).

## Part 2

### Transitional provisions

*Clauses 11 and 12* provide for transitional matters. The transitional provisions continue the old law in respect of grants that are granted or applied for before the new law comes into force, including grants that were made before the principal Act came into force. The **new law** is the law under the Plant Variety Rights Act 1987 as amended by this Bill. The **old law** means the Plant Variety Rights Act 1987 as in force immediately before it was amended by this Bill, including the Plant Variety Rights (Grantees' Rights) Order 1997. *Clause 12* inserts *new sections 39A to 39C* into the principal Act. The main effect of these provisions is that—

- if a grant or an application for a grant were made before the new law came into force, then rights, interests, entitlements, immunities, or duties must be determined under the old law:
- matters such as applications and proceedings that were started before the new law comes into force or are related to matters that were started, or grants or applications that were made before the new law comes into force, must be determined under the old law:
- the Plant Variety Rights (Grantees' Rights) Order 1997 continues in force for the purpose of determining applications, proceedings, rights, and other matters that are to be determined under the old law.

In summary,—

- if a person applies for a grant before the new law comes into force, the person can still obtain a grant if the person simply discovered the variety, subject to the other requirements for a grant. However, under the new law, mere discovery by itself is insufficient to justify a claim to ownership of a new variety. There must be a degree of human input into the development of a variety:
- if a person applies for a grant before the new law comes into force, when approving a denomination proposed for a new variety the Commissioner is not required to take into account whether the denomination may be offensive to a significant section of the community, including Māori. In future, this will have to be taken into account:
- a grant that is granted or applied for before the new law comes into force gives the less extensive rights provided for in the old law. It does not give the extra rights proposed by this Bill:

- this Bill gives broader rights in respect of the use of material harvested from the unauthorised use of reproductive material of a protected variety in situations in which the grantee has not had an opportunity to exercise the grantee's rights in relation to the reproductive material:
  - a grant that is granted or applied for before the new law comes into force does not give rights in relation to an essentially derived variety.
- 

DRAFT FOR CONSULTATION

DRAFT FOR CONSULTATION

*Hon Pete Hodgson*

## **Plant Variety Rights Amendment Bill**

Government Bill

### **Contents**

1	Title	18B	Farm-saved seed exception
2	Commencement	8	Notice of protection
	<b>Part 1</b>	9	Rights of appeal
	<b>Amendments to principal Act</b>	10	Regulations
3	Interpretation		<b>Part 2</b>
4	Making of grants		<b>Transitional provisions</b>
5	Varieties bred or discovered by 2 or more persons independently	11	Transitional provisions
6	New sections 17 to 17E substituted	12	New sections 39A to 39C inserted
	17 Rights of grantees		39A Grants applied for or made before commencement of Plant Variety Rights Amendment Act 2005
	17A Harvested material and products of harvested material		39B Continuation of applications, proceedings, actions, and matters made or commenced before commencement of Plant Variety Rights Amendment Act 2005
	17B Essentially derived varieties		39C Transitional provision relating to Plant Variety Rights (Grantees' Rights) Order 1997
	17C Nature and incidents of grantees' rights		
	17D Grant may be assigned, etc		
	17E Restrictions on rights if civil emergency		
7	New sections 18 to 18B substituted		
	18 General exceptions to grantees' rights		
	18A Exception for acts done for purpose of breeding another variety		

**The Parliament of New Zealand enacts as follows:**

### **1 Title**

- (1) This Act is the Plant Variety Rights Amendment Act **2005**.
- (2) In this Act, the Plant Variety Rights Act 1987<sup>1</sup> is called "the principal Act".

<sup>1</sup> 1987 No 5

### **2 Commencement**

This Act comes into force on the 28th day after the date on which it receives the Royal assent.

## Part 1 Amendments to principal Act

### 3 Interpretation

- (1) Section 2 of the principal Act is amended by inserting, in their appropriate alphabetical order, the following definitions:

“**breed**, in relation to a variety, includes the process of selection within the natural variation of a plant or plant population, together with the process of propagation and evaluation so as to enable the development of the variety

“**essential characteristics**, in relation to an essentially derived variety, means heritable traits that—

“(a) are determined by the expression of 1 or more genes or other heritable determinants; and

“(b) contribute to the principal features, performance, or value of the essentially derived variety

“**essentially derived variety** means a variety that—

“(a) is predominantly derived from another variety that—

“(i) is a protected variety; and

“(ii) is not itself an essentially derived variety; and

“(b) retains the essential characteristics that result from the genotype or combination of genotypes of that other variety; and

“(c) although distinct from that other variety, does not exhibit any important (as distinct from cosmetic) features that differentiate it from that other variety”.

- (2) Section 2 of the principal Act is amended by omitting from the definition of **owner** the words “or discovered”.

- (3) Section 2 of the principal Act is amended by repealing the definition of **variety**, and substituting the following definition:

“**variety** means a plant grouping (including a hybrid) that—

“(a) is contained within a single botanical taxon of the lowest known rank; and

“(b) can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes; and

“(c) can be distinguished from any other plant grouping by the expression of at least 1 of those characteristics; and

“(d) can be considered as a unit with regard to its suitability for being propagated unchanged.”

- (4) Section 2 of the principal Act is amended by adding, as subsection (2), the following subsection:
- “(2) An example used in this Act has the following status:
- “(a) the example is only illustrative of the provision to which it relates and does not limit the provision; and
  - “(b) if the example and the provision to which it relates are inconsistent, the provision prevails.”

#### **4 Making of grants**

Section 10 of the principal Act is amended by inserting, after subsection 3, the following subsection:

- “(3A) Despite subsection (3), the Commissioner must not approve a proposed denomination if the Commissioner considers that its use or approval would be likely to offend a significant section of the community, including Māori.”

#### **5 Varieties bred or discovered by 2 or more persons independently**

Section 11(b) of the principal Act and the heading to that section are amended by omitting the words “or discovered”.

#### **6 New sections 17 to 17E substituted**

The principal Act is amended by repealing section 17, and substituting the following sections:

##### **“17 Rights of grantees**

- “(1) A grantee has the right to prevent anyone from doing any of the following acts in relation to the reproductive material of a protected variety:
- “(a) produce or reproduce the material:
  - “(b) condition the material for the purpose of propagation:
  - “(c) sell (including offer to sell) or market the material:
  - “(d) import the material:
  - “(e) export the material:
  - “(f) stock the material for the purposes of any of the acts described in paragraphs (a) to (e).
- “(2) A grantee’s rights under subsection (1) are not infringed if a person does an act referred to in that subsection with the grantee’s authority and in accordance with any terms and conditions specified by the grantee.

- “(3) A person who sells the reproductive material of another variety under the denomination of the protected variety infringes the grantee’s rights unless—
- “(a) the grantee has authorised the sale; or
  - “(b) the groups of plants to which the varieties belong are internationally recognised as being distinct for the purposes of denomination.

“17A **Harvested material and products of harvested material**

- “(1) This section applies to—
- “(a) harvested material that is obtained through the unauthorised use of reproductive material of a protected variety, if the grantee has not had a reasonable opportunity to exercise the grantee’s rights in relation to the reproductive material; and
  - “(b) products made from harvested material to which paragraph (a) applies.
- “(2) The grantee has the rights set out in **section 17(1)** in relation to harvested material and products made from harvested material to which this section applies.
- “(3) A grantee’s rights in relation to material to which this section applies are not infringed if a person does an act referred to in **section 17(1)** with the grantee’s authority and in accordance with any terms and conditions specified by the grantee.

“17B **Essentially derived varieties**

- “(1) A grantee has the same rights in relation to an essentially derived variety as the grantee has in relation to the protected variety itself.
- “(2) **Subsections (2) to (4) of section 17C** apply in respect of proceedings for the infringement of a grantee’s rights relating to an essentially derived variety.
- “(3) This section does not apply to an essentially derived variety or rights in relation to an essentially derived variety unless the grant for the protected variety from which the essentially derived variety is derived was both applied for and made after the commencement of the Plant Variety Rights Amendment Act **2005**.

**“17C Nature and incidents of grantees’ rights**

- “(1) The rights of a grantee under a grant are proprietary rights, and the grantee may sue if they are infringed.
- “(2) In awarding damages (including any exemplary damages), or granting any other relief in proceedings for the infringement of the rights of a grantee, a Court must take into consideration—
- “(a) any loss suffered or likely to be suffered by the grantee as a result of the infringement; and
  - “(b) any profits or other benefits derived by any other person from the infringement; and
  - “(c) the flagrancy of the infringement.
- “(3) If it is proved or admitted, in proceedings for the infringement of a grantee’s rights, that a person (**person A**) infringed the rights of another person (**person B**), person B is not entitled to damages, but is entitled instead to an account of profits, if person A proves that, at the time of the infringement, person A—
- “(a) was not aware it was an infringement; and
  - “(b) had no reasonable grounds for supposing it was an infringement.
- “(4) **Subsection (3)** does not affect a grantee’s entitlement to any relief in respect of the infringement of that grantee’s rights other than damages.

**“17D Grant may be assigned, etc**

A grant may be assigned, mortgaged, or otherwise disposed of, and may devolve by operation of law.

**“17E Restrictions on rights if civil emergency**

- “(1) Despite **sections 17 to 17D**, the Minister may, by notice in the Journal, impose restrictions of a nature specified by the Minister on a grantee’s rights in respect of any specified variety if—
- “(a) a state of national emergency has been declared under the Civil Defence Emergency Management Act 2002; and
  - “(b) the Minister is satisfied that it is necessary in the public interest for the restrictions to apply during the state of emergency.

“(2) The Minister must not impose restrictions on a grantee’s rights under **subsection (1)** unless the Minister has first ensured that the grantee will be adequately compensated.”

**7 New sections 18 to 18B substituted**

The principal Act is amended by repealing section 18, and substituting the following sections:

**18 General exceptions to grantees’ rights**

“(1) A grantee’s rights under this Act are not infringed if a person—

“(a) propagates, grows, or uses a protected variety or essentially derived variety for non-commercial purposes; or

“(b) uses reproductive or harvested material of a protected variety or an essentially derived variety or products of harvested material of a protected variety or an essentially derived variety for human consumption or other non-reproductive purposes.

“(2) This section applies despite anything in **sections 17 to 17D**.

**18A Exception for acts done for purpose of breeding another variety**

“(1) A grantee’s rights under this Act are not infringed by—

“(a) acts done in relation to a protected variety or essentially derived variety for the purposes of breeding a new variety; or

“(b) any of the acts referred to in **section 17(1)** in relation to—  
“(i) the reproductive material of that new variety; or  
“(ii) the harvested material and products of harvested material obtained from the reproductive material of that new variety.

“(2) **Subsection (1)(a)** applies despite anything in **sections 17 to 17D**.

“(3) **Subsection (1)(b)** applies despite anything in **sections 17, 17A, and 17C** but is subject to **section 17B**.

“(4) This section does not apply if the acts referred to in **subsection (1)** require the repeated use of the protected variety or a variety that is, in relation to the protected variety, an essentially derived variety.

**“18B Farm-saved seed exception**

“(1) This section applies if—

“(a) a person engaged in farming activities legitimately obtains reproductive material of a protected variety for use by that person in farming activities on land owned or leased by that person; and

“(b) the person subsequently harvests further reproductive material from plants that person has grown from the first-mentioned reproductive material on land owned or leased by that person; and

“(c) the protected variety is not an excluded variety under regulations made under **section 38(na)**.

“(2) For the purposes of **subsection (1)**, reproductive material may be legitimately obtained by the previous operation of this section.

“(3) If this section applies, a grantee’s rights are not infringed if a person conditions or reproduces so much of the reproductive material that the person requires for that person’s use for reproductive purposes in farming activities on land owned or leased by that person.

“(4) **Subsection (3)** applies in respect of the reproductive material of an essentially derived variety as if—

“(a) the references in this section to reproductive material were references to the reproductive material of the essentially derived variety; and

“(b) the reference to a protected variety in **subsection (1)(c)** were a reference to the protected variety from which the relevant essentially derived variety is derived.

“(5) This section applies despite anything in **sections 17 to 17D**.”

**8 Notice of protection**

(1) Section 20(1)(a) of the principal Act is amended by omitting the expression “section 17” and substituting the expression “**sections 17 to 17B**”.

(2) Section 20(2) of the principal Act is amended by omitting the expression “section 17(8)”, and substituting the expression “**section 17C(3)**”.

**9 Rights of appeal**

Section 23(4) of the principal Act is amended by inserting, after paragraph (a), the following paragraph:

“(aa) refusing to approve a proposed denomination; or”.

## **10 Regulations**

Section 38 of the principal Act is amended by inserting, after paragraph (n), the following paragraph:

“(na) providing, for the purposes of **section 18B(1)(c)**, that a protected variety is an excluded variety:”.

## **Part 2 Transitional provisions**

### **11 Transitional provisions**

- (1) The heading to section 39 of the principal Act is amended by adding the words “**relating to Plant Varieties Office and Commissioner**”.
- (2) Section 39 of the principal Act is amended by repealing subsections (3) to (6).

### **12 New sections 39A to 39C inserted**

The principal Act is amended by inserting, after section 39, the following sections:

#### **“39A Grants applied for or made before commencement of Plant Variety Rights Amendment Act 2005**

- “(1) This section is for the purpose of determining the rights, interests, entitlements, immunities, or duties of any person in relation to a variety to which this section applies.
- “(2) This section applies to a variety if—
  - “(a) a grant was made in respect of that variety before the commencement of the Plant Variety Rights Amendment Act **2005**; or
  - “(b) an application for a grant in respect of that variety was made before the commencement of the Plant Variety Rights Amendment Act **2005**.
- “(3) If this section applies,—
  - “(a) any right, interest, entitlement, immunity, or duty of any person in relation to the variety must be determined under the old law; and
  - “(b) without limiting **paragraph (a)**, the applicable definition of **owner** is the definition that was in force under the old law.

- “(4) In this section and in **section 39B**, **old law** means the law as in force immediately before the commencement of the Plant Variety Rights Amendment Act **2005**.

**Example**

Person A obtained a grant before the commencement of the Plant Variety Rights Amendment Act **2005**. Person B obtained a grant after the commencement of the Plant Variety Rights Amendment Act **2005** but applied for that grant before the commencement of that Act. Person A and person B have both obtained grants in respect of wheat varieties (which are not vegetatively propagated). Their rights are determined under the old law. Their rights include the exclusive right to sell reproductive material of the protected variety.

Person A’s rights and person B’s rights are not infringed if another person propagates the relevant protected variety for non-commercial use, or uses it to breed a new variety (as long as this does not involve repeated use of the protected variety). This is because under the old law similar exceptions apply as those that apply under **section 18** and **section 18A**.

Person A and person B do not have rights in respect of varieties that are essentially derived from the protected variety for which they hold a grant (see **section 17B(3)**), and they do not have any of the other rights set out in **sections 17 to 17D** other than those which existed under the old law.

“**39B Continuation of applications, proceedings, actions, and matters made or commenced before commencement of Plant Variety Rights Amendment Act 2005**

- “(1) This section applies to an application, proceeding, action, or other matter that—
- “(a) was made or commenced before the commencement of the Plant Variety Rights Amendment Act **2005**; or
  - “(b) relates to an application, proceeding, action, or other matter that was made or commenced before the commencement of the Plant Variety Rights Amendment Act **2005**.
- “(2) If this section applies, the application, proceeding, action, or other matter must be continued, considered, completed, and determined under the old law.
- “(3) Without limiting **subsection (2)**, the applications, proceedings, actions, and other matters referred to in **subsection (1)** include the following:

- “(a) applications under section 5 that were made before the commencement of the Plant Variety Rights Amendment Act **2005**, including a proposal for a denomination to be approved by the Commissioner:
  - “(b) objections under section 6 that were made before commencement of the Plant Variety Rights Amendment Act **2005**:
  - “(c) objections under section 15 that were made before the commencement of the Plant Variety Rights Amendment Act **2005**:
  - “(d) requests under section 21 that were made before the commencement of the Plant Variety Rights Amendment Act **2005**:
  - “(e) proceedings for the infringement of any right, interest, or entitlement in relation to a variety that were commenced before the commencement of the Plant Variety Rights Amendment Act **2005**:
  - “(f) any appeal under section 25 that was commenced before the commencement of the Plant Variety Rights Amendment Act **2005**:
  - “(g) proceedings for an offence under section 37 that were commenced before the commencement of the Plant Variety Rights Amendment Act **2005**.
- “(4) Without limiting **subsection (2)**, if this section applies, the applicable definition of **owner** is the definition that was in force under the old law.

**Example 1**

A person makes an application for a plant variety grant before the commencement of the Plant Variety Rights Amendment Act **2005**. There is no statutory requirement for the Commissioner to consider whether a proposed denomination is likely to offend a significant section of the community, including Māori.

**Example 2**

Person A makes an objection under section 6 after the commencement of the Plant Variety Rights Amendment Act **2005** in relation to an application for a grant made by person B before the commencement of the Plant Variety Rights Amendment Act **2005**. The Commissioner must determine this question in accordance with the definition of owner in force under the old law. Under this definition a person can be an owner if the person either bred or discovered the variety (subject to other requirements, such as that the variety must be new and distinct). If the variety was discovered then, in contrast to the new law, there is no requirement that there must have been a process of selection, propagation, and evaluation in the development of the variety.

**Example 3**

Person A makes an objection under section 15(2) before the commencement of the Plant Variety Rights Amendment Act **2005** that a grantee (**person B**) was not the owner of the variety at the time the grant was made (also made before the commencement of this section). As in example 2, the Commissioner must determine this according to the definition of owner in force under the old law.

**“39C Transitional provision relating to Plant Variety Rights (Grantees’ Rights) Order 1997**

Despite the repeal of section 17 by section 6 of the Plant Variety Rights Amendment Act **2005**, the Plant Variety Rights (Grantees’ Rights) Order 1997, as in force immediately before the commencement of the Plant Variety Rights Amendment Act **2005**, continues in force for the purpose of—

- “(a) determining any rights, interests, entitlements, immunities, or duties of any person to whom **section 39A** applies; and
- “(b) any application, proceeding, action, or other matter to which **section 39B** applies.

**Example**

Person A obtained a grant before the commencement of the Plant Variety Rights Amendment Act 2005 and person B obtained a grant after the commencement of the Plant Variety Rights Amendment Act 2005 but applied for that grant before the commencement of that Act. Person A's rights exist in vegetatively propagated begonias, and person B's rights exist in vegetatively propagated fruit trees.

Person A's and person B's rights are determined under the old law. The exclusive rights include, in this case, both the right to sell reproductive material and propagate the relevant variety for the commercial production of fruit, flowers, and other products (as in both cases the plants fall into the category of vegetatively propagated fruit-producing plants, vegetatively propagated ornamental plants, or vegetatively propagated vegetable-producing plants).

Person A and person B do not have rights in respect of varieties that are essentially derived from the protected variety (see **section 17B(3)**), and they do not have any of the other rights set out in **sections 17 to 17U** other than those which existed under the old law.”

DRAFT FOR CONSULTATION