

Australia's experience concerning propagating and harvested material

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Outline

- Legislation
 - Australia - Plant Breeder's Rights Act 1994, UPOV 91 definitions

- Experience
 - Barley
 - Royalty collection

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Legislation

- Plant Breeder's Rights Act 1994 (PBR Act)
 - in conformity with UPOV 1991
 - defines "propagating material"

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Legislation – Propagating Material

- Definition:

“propagating material, in relation to a plant of a particular plant variety, means any part or product from which, whether alone or in combination with other parts or products of that plant, another plant with the same essential characteristics can be produced.”

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Legislation – Harvested Material

- No definition
- Section 14 - harvested material
- Section 15 - products obtained from harvested material

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s14 Extension of PBR to harvested material

If:

- Propagating material is produced or reproduced without authorisation
- and
- No **reasonable opportunity** to exercise PBR on the propagating material
- and
- Material is harvested from the propagating material

Then:

The scope of the PBR operates as if the harvested material were propagating material. (includes harvested material not retained by farmers for their next crop)

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s15 Extension of PBR to products obtained from harvested material

- If:
- Same conditions as for harvested material
 - **and**
 - No **reasonable opportunity** to exercise PBR on the harvested material
 - **and**
 - Products are made from the harvested material

Then:

The scope of the PBR operates as if those products were propagating material

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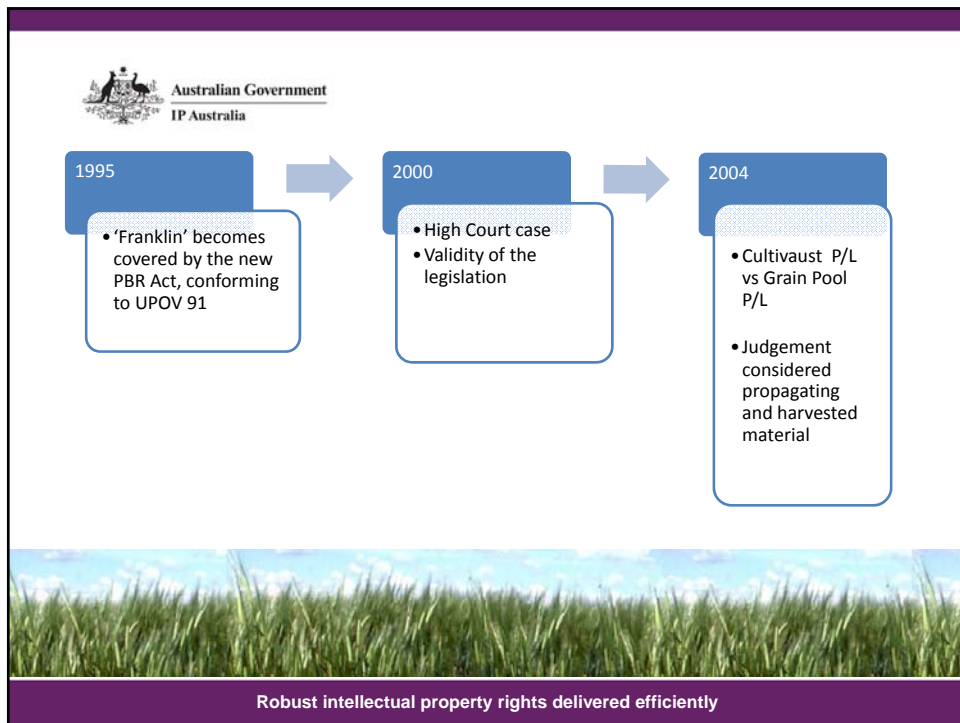
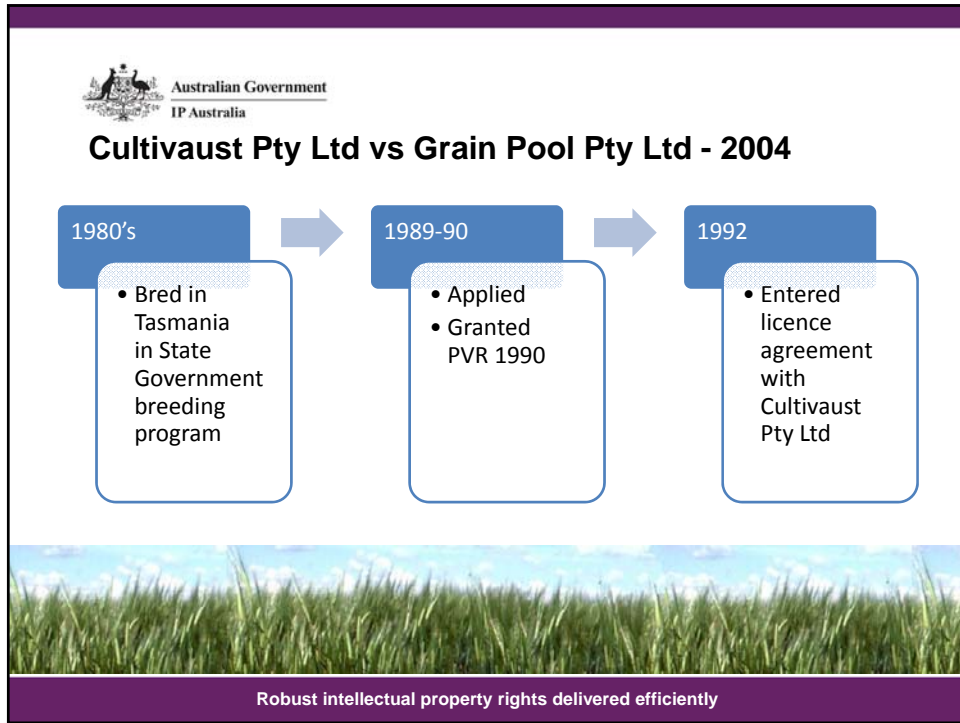


Experience - Barley

- 'Franklin' – a variety of malting barley
- very successful, widely grown and exported
- Involved in legal action



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Cultivaust

- Produce seed
- Sell seed
- Commercialisation
- Royalties
- Claim: extends to harvested material and products



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Grain Pool

- Sole marketing authority - State Act
- Mandatory
- No purchase, but sale
- Compensation
- Infringement – harvested material and products



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Considerations

- Authorisation
 - whether production or reproduction of the propagating material had been authorised by the owner. Ie Cultivaust as the licensee

- Reasonable opportunity
 - whether rights were extended to harvested material or product of harvested material under sections 14 and 15 of the PBR Act

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Decision

- Authorisation
 - The court found that the growing of the first generation from seed bought from the PBR owner is authorised as it is implied by the buying of the seed. Consequently rights on first generation crops do not extend to harvested material as the PBR Act is not satisfied, **ie authorisation has occurred.**

 - However any subsequent generations grown (ie second generation onwards) from farm saved seed may require authorisation of the PBR owner as it is not implied in the sale of the initial seed.

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Decision

- Reasonable opportunity
 - the PBR owners were aware that farmers were saving seed and harvesting second and subsequent generations without authority and so had **reasonable opportunity** to exercise their rights. Instead of taking action the PBR owner preferred to seek end point royalties through the statutory marketing authorities.

Consequently section 14 of the PBR Act was not satisfied.

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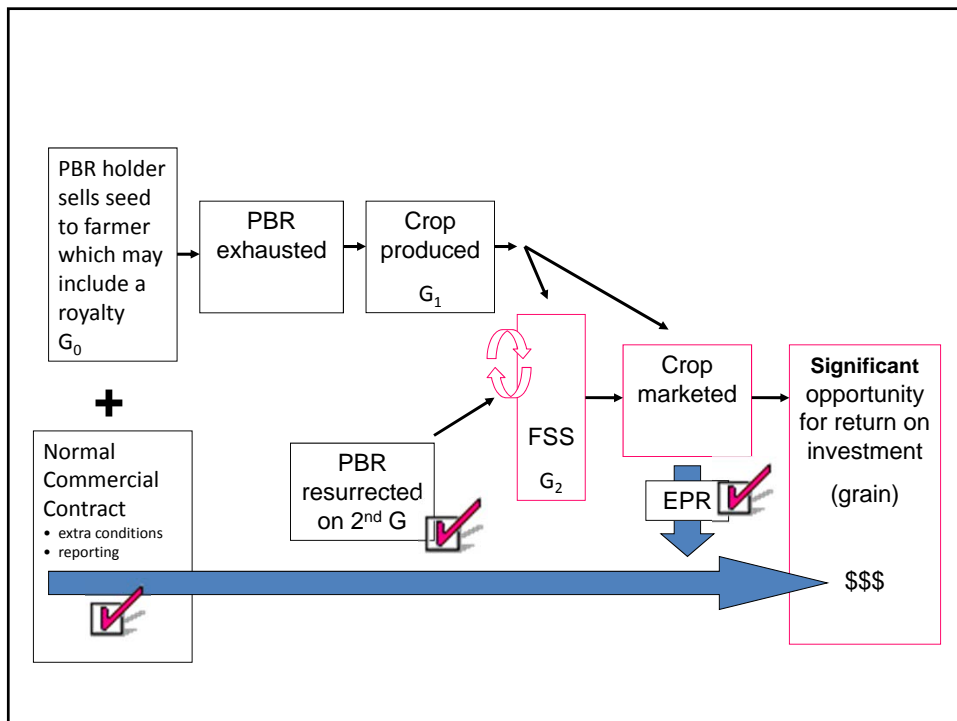
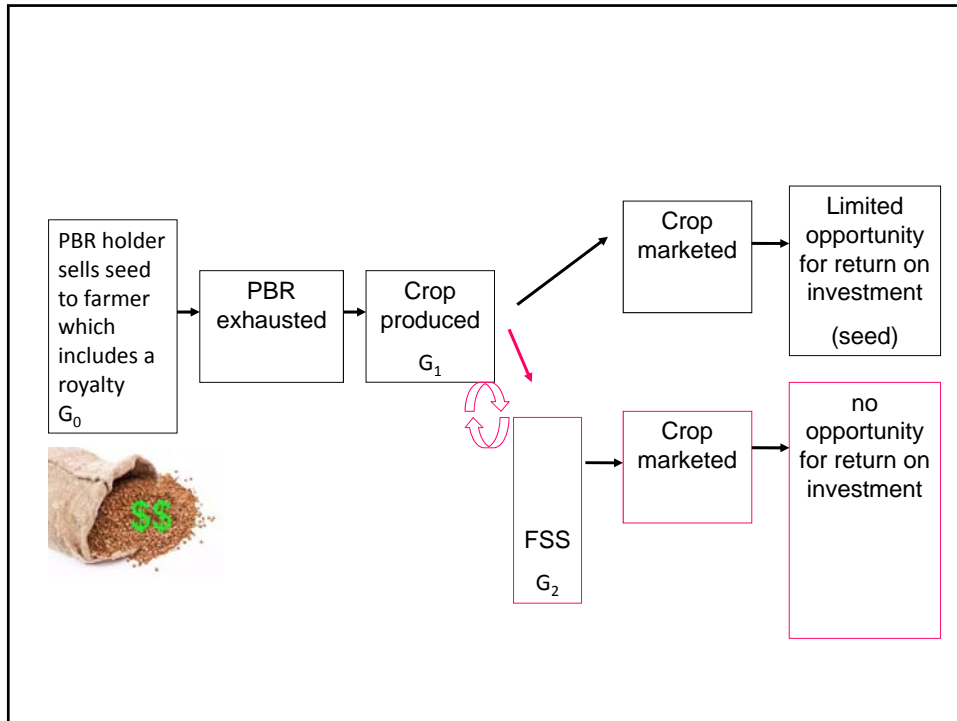
Consequence

- Reasonable opportunity is at first point of sale

“The opportunity to impose a production levy or end point royalty is intended to be exercised with respect to lawfully acquired propagating material at the time of its acquisition. If that opportunity is not taken, then ss 14 and 15 do not extend the scope of s 11”

le from the propagating material to the harvest material or products thereof

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Summary

- Authorised sale of the initial seed does not exclude the operation of PBR to all subsequent generations of crop from seed originally purchased from the grantee
- The onus is on the PBR holder to protect their interest by making use of their 'reasonable opportunity' at the first point of sale
 - can require contracts on commercial production and farmers pay on the commercialised harvest arising from the saved seed.
- If PBR holder does not offer contracts and sells the seeds without restriction, then it may be open to farmers to commercialize the harvest and any subsequent harvest – provided it is not sold as seed.

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References

- Cultivaust case – FCA
<http://www.fedcourt.gov.au/publications/judgments/>

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Thank You



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