

End Point Royalties

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Outline

- Legislation
- Interpretation
- Experience
- Sanctions
- Summary

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Legislation

PBR Act 1994 , Section 17

Conditioning and use of farm saved seed does not infringe PBR
If:

- (a) a person engaged in farming activities legitimately obtains propagating material of a plant variety covered by PBR either by purchase or by previous operation of this section, for use in such activities; **and**
- (b) the plant variety is not included within a taxon declared exempt **and**
- (c) the person subsequently harvests further propagating material from plants grown from that first-mentioned propagating material;

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Legislation (cont.)

Furthermore;

the PBR is not infringed by:

- (d) the conditioning of so much of that further propagating material as is required for the person's use for reproductive purposes; **or**
- (e) the reproduction of that further propagating material.

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UPOV 91 – Article 15(2)

[Optional exception] Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or Article 14(5)(a)(ii).

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Interpretation and experience

Known as 'farm saved seed' exemption, 'farmers exemption' or 'farmers privilege'

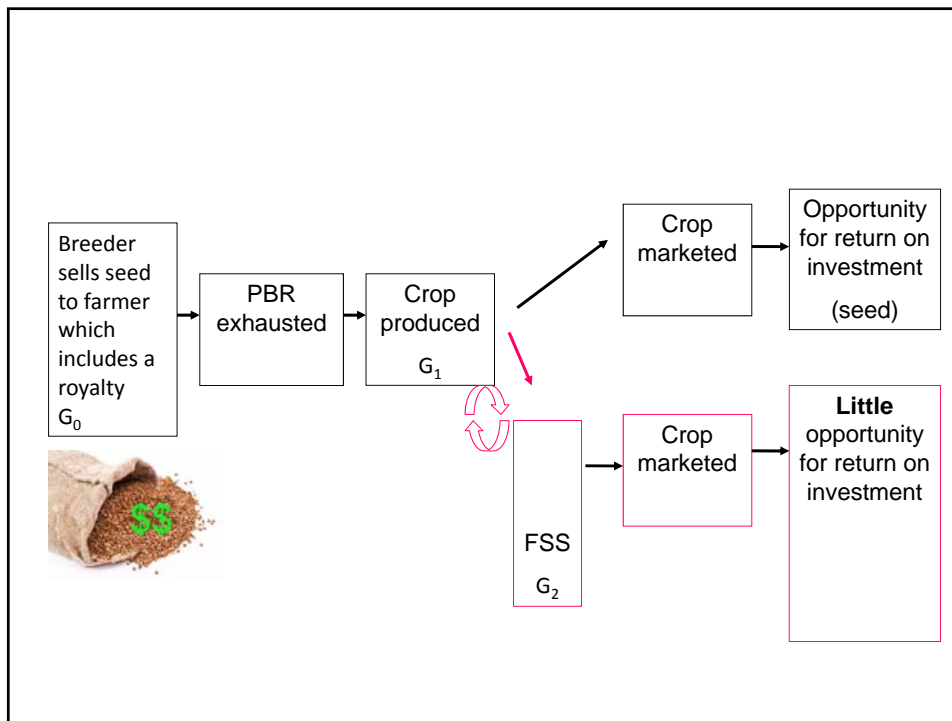
- Operation
 - own use
 - subsequent crops - PBR is not exhausted
- Cultivaust decision
- Zee Sweet vs Magnom Orchards

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Cultivaust vs Grain Pool

- Authorised sale of the initial seed does not exclude from the operation of PBR all subsequent generations of crop from seed originally purchased from the grantee
- Exhaustion of PBR by the sale of initial seed does not extend to cover the sale of second and subsequent generations of crops, assuming they are grown from retained farm saved seed.
- The harvest from farm saved seed, except for further farm saved seed, is to be treated as if it were propagating material to which section 11 operates, that is it is propagating material and therefore subject to PBR
- The [reasonable] opportunity to impose a production levy or end point levy is intended to be exercised with respect to lawfully acquired propagating material at the time of its acquisition.

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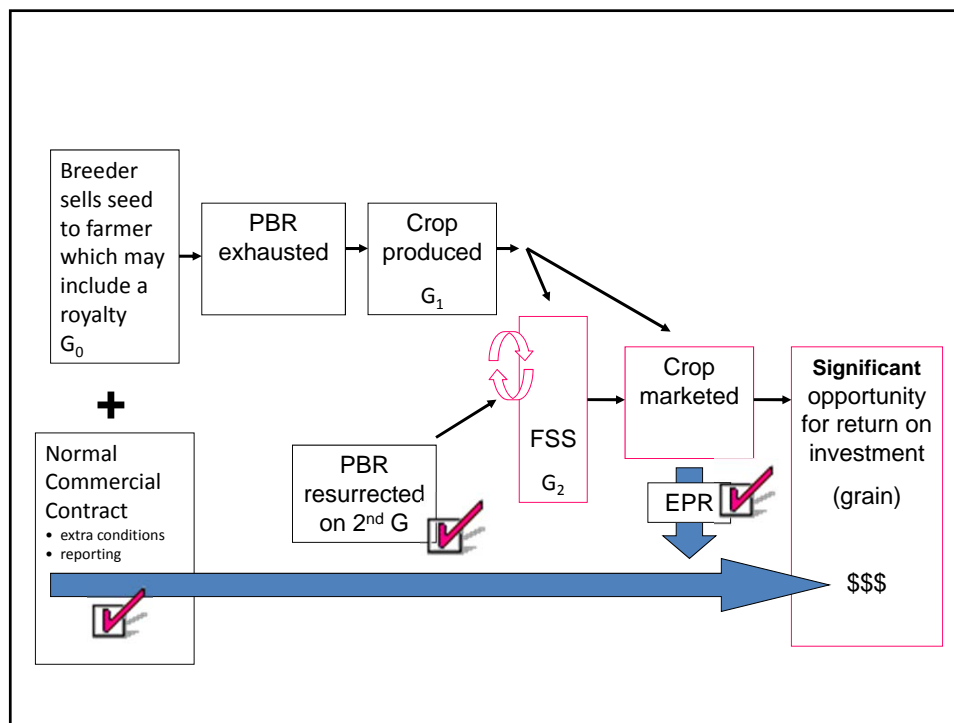


Plant Breeder's Rights (PBR) and End Point Royalties (EPR)

EPR is a royalty payment system that occurs at the end of the production cycle

- EPR were accepted by major growers as an equitable and economically viable PBR value capture mechanism since late 1990s
- This is an alternative to seed royalties which cannot capture sufficient resources to adequately sustain plant breeding activities.
- PBR Act provides the legal basis that makes EPR possible.
- Growers pay the EPR not traders
- Australian major field crop breeding programs, including wheat, barley, canola now reliant on EPR income for survival

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Features of EPR and PBR

- EPR relies on 'fair' commercial contracts
 - Not "if" but "when"
 - Works better where harvest is delivered to bulk accumulators
 - Grain traders are becoming variety owners
 - There will always be some non-compliance

- Role of PBR
 - Provides a foundation to establish 'normal' commercial arrangements
 - Provides repeated opportunities, especially when variety 'escapes' to third parties
 - Also PBR is a suitable balance: simple, allows disclosure, reasonably inexpensive, non-adversarial, based on verified evidence, growing international reciprocity; fits with contracts

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Zee Sweet vs Magnum Orchards

Zee Sweet owners – required growers, including Magnum Orchards, to enter into a contract included conditions additional to PBR including;

- non-propagation (ie no FSS)
- EPR and reporting requirements
- penalties

Magnum Orchards were claimed to be guilty of breach of contract

Court action in relation to a commercial contract supported by PBR

- \$2 per tree royalty and a 5% production royalty
- quality control & packing requirements

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- Court decision - Magnom Orchards guilty of breach of contract
 - contract provisions did not breach Trade Practices Act
 - 'Closed loop' marketing arrangements not inherently anti competitive

destruction of 14,000 peach and nectarine trees
costs of \$750k

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Sanctions

- Breach of contract
 - Civil action
 - No access to future new varieties
- Infringement of PBR
 - Disposal of harvest
 - Civil/criminal action
- Positive variety identification available (eg DNA)
 - Increasing chances of being caught

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Summary

- FSS is a balance between producer and breeder
 - Farmer lobby groups have agreed that to get a steady flow of new varieties, the legitimate interests of the breeder must be respected
 - Need for transparency
- The onus is on the breeder to protect their interest by making use of their 'reasonable opportunity' at the first point of sale
 - Breeders can propose contracts on commercial production and farmers pay on the commercialised harvest arising from the saved seed.
- If breeder 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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Thank You

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Issues

- Farmers faced with many different contracts
 - Different conditions/obligations
- Compliance
 - Relies on access to 'point-of-delivery information' (including variety identity)
 - Contacts establish reporting requirements
 - Accumulators choosing to provide a commercial service to the breeder in return for \$ and indemnity/freedom to operate